

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ERIC SOUVANNAKANE,
Plaintiff

v.

SEARS, ROEBUCK & CO., WILLIAM
SULLIVAN, RICHARD SPELLMAN,
BARBARA TAGLIARINO, KEVIN SULLIVAN,
ALICIA COVIELLO, GARY MANSFIELD
Defendants

Civil Action No. 0412164MLW

**OPPOSITION OF THE DEFENDANTS, SEARS, ROEBUCK AND CO.,
WILLIAM SULLIVAN, RICHARD SPELLMAN, BARBARA TAGLIARINO,
ALICIA COVIELLO AND KEVIN SULLIVAN TO PLAINTIFF'S MOTION TO
PRESERVE THE RIGHT TO AMEND HIS COMPLAINT**

The defendants, Sears, Roebuck and Co., William Sullivan, Richard Spellman, Barbara Tagliarino, Alicia Coviello and Kevin Sullivan (the "Sears Defendants"), submit this opposition to the Plaintiff's Motion to Preserve The Right to Amend His Complaint. As discussed below, the plaintiff's motion again mischaracterizes the legal standards on which the Sears Defendants rely in support of their motion to dismiss. Moreover, the relief sought in the plaintiff's motion exceeds the scope of Fed. R. Civ. P. 15. In support of their opposition, the Sears Defendants state the following:

1. Contrary to the plaintiff's contention, the Sears Defendants have never once argued, nor do they now argue, that there is a heightened pleading standard for civil rights cases. In fact, as the plaintiff recognizes in his motion, the Sears Defendants have expressly acknowledged that "there is no heightened pleading standard for civil rights actions." *See* Memorandum of the Sears Defendants in Support of their Motion to

Dismiss, pp. 6-7. More specifically, the Sears Defendants argue that the allegations of the plaintiff's complaint are so nonspecific and conclusory that they do not meet even the minimal requirements of Fed. R. Civ. P. 8(a)(2).

2. Furthermore, the plaintiff's request that he be permitted to amend his complaint as a matter of right in the event that the Court allows the Sears Defendants' motion to dismiss is entirely improper under Fed. R. Civ. P. 15. If the plaintiff concedes that his complaint is somehow deficient, he may amend the complaint as a matter of right only *before* the Court issues its ruling on the motion to dismiss. *See Soderman v. Horan, et al.*, 165 F.R.D. 8, 10, n. 3 (D.Mass. 1996) (plaintiff has opportunity to amend the complaint as a matter of right without leave of court after motion to dismiss is filed). In the alternative, if the plaintiff chooses not to exercise this right before the Court rules and the Court dismisses the complaint, the plaintiff is at that point free to file a motion for leave to amend the complaint, stating his grounds in support of that motion in accordance with Rule 15(a). *See The Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 22 (1st Cir. 1989) (If the plaintiff does not amend the complaint as a matter of right before the district court rules on the motion to dismiss, he may file a motion for leave to amend the complaint after the court has issued its ruling).

3. The plaintiff's motion is nothing more than an attempt to avoid having to file a motion for leave to amend, with sufficient grounds to support that motion, in the event this Court grants the Sears Defendants' motion to dismiss. If allowed, the relief sought in the plaintiff's motion would not only result in a waste of the parties' and the Court's resources, it would deprive the Sears Defendants of the opportunity to raise any

arguments in opposition to an attempt by the plaintiff to amend his complaint after the Court's ruling on the motion to dismiss.

4. For all of these reasons, the Sears Defendants request that this Court deny the plaintiff's Motion to Preserve the Right to Amend his Complaint.

Defendants,
Sears, Roebuck and Co., William Sullivan,
Richard Spellman, Barbara Tagliarino,
Alicia Coviello, and Kevin Sullivan
By their Attorneys,

/s/ Liza J. Tran
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